IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO 2765 OF 2003
IN
SUIT NO. 1989 OF 1995

Sanjeev Alias Sanjay Subhash Grover ..Plaintiff

Vs.

Vertex Trading Co. & Anr. ..Defendants.

Mr. N.J. Thakkar, Sr. Counsel i/b M/s Markand Gandhi & Co. for the plaintiff.

Mr. S. Purohit i/b B.K. & Girdharlal & Co. for the defendants.

CORAM : ANOOP V.MOHTA J.

DATE : 7TH OCTOBER, 2005.

P.C.

. The notice of motion has been filed by the applicant-plaintiff for ad-interim relief, as well as, interim relief against the respondents-defendants in respect of the suit premises i.e. Unit No.14, ground floor, Ashish Co-operative Ind Estate Ltd. Gokhale Road, Mumbai. These reliefs are (a) for appointment of receiver with all powers and order XXXX of the Code of Civil Procedure (C.P.C.), (b) Mesne profit from March, 1986 till the delivery of the suit premises at the rate of Rs. 75,000/- per month (c) order of injunction, from

storing combustible goods in the suit premises and (d) a restrainment order from alienating or parting with the possession of the suit premises and or a creating any 3rd party interest in the suit premises or any part thereof. A supporting affidavit dated 17th September, 2003 has been controverted by an counter affidavit dated 8th October, 2003, filed by defendant No.2, as a partner of defendant No.1. After considering the rival contentions as raised by an order dated 13th October, 1993, at ad-interim stage, this Court has granted ad interim relief in terms of prayer clause (d), except bracketed words. By the same order, the defendants are also restrained from storing any combustible goods in the suit premises. No other ad-interim relief as sought were granted.

2. The notice of motion on the same set of facts and affidavits, as referred above, now argued at the final hearing stage by the learned Sr. Counsel, Mr.N.J. Thakkar, for the plaintiff, for the interim relief in terms of prayer clause (a) to (e), apart from confirmation of the order dated 13th October, 2003. The learned Counsel, Mr. Purohit, appearing for the defendants, resisted the same, basically, by referring

to the undisputed position on the record of pending of civil appeal No. 6226 of 2002 in the Supreme Court of India, from the judgment and order dated 19/7/2002, in Writ Petition No. 3470 of 2002, between the parties, about the landlord and tenant's relationship in reference to the premises in question. By the said writ petition, the defendants had challenged a judgment and decree dated 9th November, 2001, in Appeal No. 430 of 1999, passed by the appellate bench of Small Causes Court, Bombay, by reversing the decree and Judgment dated 16th March, 1999, passed by the learned Judge Small Causes Court, in R.A.D. Suit No. 1744 of 1986. By final order dated 19/7/2002 passed by the High Court, the above said writ petition was rejected. Therefore, the special leave petition came to be filed in the Supreme Court of India and by an order dated 23rd September, 2003, the special leave to appeal was granted and the same has been registered as Civil Appeal No. 6226 of 2002. The said appeal is still pending.

3. By the judgment and decree dated 16th March, 1999, the Judge, Small Causes Court, in Suit NO. 1744 of 1986, defendant No.1 was declared tenant in respect of the suit premises. The original plaintiffs and M/s

Vertex Sales Corporation were restrained from trespassing and interfering with the possession of defendant NO.1, without the due process of law. Therefore, the plaintiff, and the said M/s Vertex Sales Corporation, had preferred appeal No. 430/1999, against the said order, of the small causes Court. By an order, dated 9/11/2001, the appellate Bench of the small Causes Court, has allowed the said appeal and held that the suit agreement was not a lease and there was no transfer of the interest in immovable property. The defendants were directed to deposit the arrears of compensation at the rate of Rs. 3000/- per month from the month of March, 1982, till the date of the said order within 4 weeks. The said order has been without prejudice to the rights and contention of the parties about the mesne profit.

4 . The defendants, as alleged, failed and neglected to pay the compensation as ordered and therefore, an revocation application was filed by the plaintiff in the Supreme Court of India. The Supreme Court however, by an order dated 13th March, 2002 has placed the revocation application along with the appeal.

5. There is no dispute that by the order dated 9/11/2001, the appellate Court of Small Causes Court, directed the respondents to deposit the arrears of compensation at the rate of Rs. 3000/- per month. The said order has been duly complied with by the defendants. They have been making the payments accordingly. The application filed for claiming Rs. 75,000/ per month was withdrawn, as not pressed. As observed by the Apex Court, in its order dated 22nd September, 2003, in the Civil Appeal No 6226/2002.

6. The learned Counsel appearing for the plaintiff, mainly contended that the grant of special leave petition in the present facts and circumstance of the case, in no way affects the power of the Court to pass such interlocutory orders, including appointment of receiver and/or grant of injunction, and/or order of attachment before the judgment. He in support of his submission has relied on various authorities.

7. The learned Counsel appearing for the defendants, resisted the same and further contended that grant of the special leave petition in the present case, itself means the judgment and decree of appellate Court

in favour of the plaintiffs is under scrutiny of the Apex Court. Therefore, there is no question of considering any of the submissions, as raised and insisted in this notice of motion and specially, the prayer clause (a) and (b). He further contended that the judgment and decree by the appellate Court, as sought to be relied upon by the plaintiff, unless the Apex Court decides if cannot be said to be final and binding to conclude the disputes relating to the status and premises in question, between the parties. Therefore, no relief as claimed can be granted to the plaintiff. He in support of his contention has relied on AIR 1970 S.C. 809 (Shashibhushan Prasad Misra (dead) and another V. Babuaji Rai (dead) and others), AIR 1931 Privy Council 263 (S.P.A. Annamalay Chetty V. B.A. Thoranhill). The Apex Court in Shashibhushan Prasad (supra) observed as under;

> "As soon as the appeal was filed by the plaintiffs in the High Court the decision of the Trial Court lost its character of finality and the question whether the suit lands appertained to village Sirpur Majrahia become once again res subjudice. The case of 58 Ind App 158 = (AIR 1931 PC 114) (Supra) shows that a decision operates as res judicata between co-defendants if (1) there is a conflict of interest between them; (2) it is necessary to decide that conflict in order to give the plaintiffs the reliefs which they claim and (3) the question

> between the co-defendants is finally decided. In the present case, the third condition was not satisfied. The question whether the suit lands appertain to Sirpur Majrhia was snot finally decided between the deity and the co-defendnats. On the filing of the appeal by plaintiffs, the question become once more the subject of judicial inquiry between the deity and the contesting defendants."

8. None of those cases had dealt with the issue in reference to the power of the trial Court to pass interlocutory or such other orders pending the appeal in the Supreme Court, arising out of the same premises and relationship of the landlord and tenant.

9. The basic aspect is, if a case is made out with supporting material to pass any urgent inter locutary order passed under provisions of order 22 rule 3 or 4 or order 39 rule 1 and 2 or order 40 rule 1 or order 48 rule 6 of C.P.C. pending the appeal, it does not preclude the trial Court from entertaining such an application and to pass such appropriate order or direction without expressing the final opinion on the merits of main subject matter pending before the Supreme Court or High Court.

In **(Madanlal Agarwal V. Smt. Kamlesh Nigam) (AIR 1975**

Madhya Pradesh 132)

> "Even apart from that, the basic reason, we think, was that the trial Court would not lose jurisdiction to deal with collateral matters which would not be towards further trial of the suit on merits, but which would only be collateral or incidental to the suit being kept alive. We may illustrate the said point as under."
>
> "Similarly, we do not see any reason why proceedings under Order 39, Rule 1 or 2 or order 40. Rule 1 of the Code of Civil Procedure cannot be taken in the trial Court during the pendency of a stay order passed by the appellate or the revisional Court. The proceeding relating to grant of injunction or appointment of a receiver may be proceeding in the suit, but this would not be a proceeding in further trial of the suit on merits. Suppose, if a party is trying to damage the property, we do not see any reason why the party aggrieved cannot approach the trial Court for appointment of a receiver or for an injunction. Similarly, if one of the parties tried to take steps which would ultimately result in defeating the decree that might be passed, we do not see any reason why the party aggrieved cannot be allowed to approach the trial Judge for an order of attachment before judgment under Order 38, Rule 5 of the Code of Civil Procedure which, although may be a proceeding in the suit, will not be in furtherance of the trial of the suit on merits, but it would only be a protective step so as to ensure that the defendant may not be able to defeat any ultimate decree that might be passed in the suit."

In **(Dilip Kumar Biswas V. Kamalendu Chanda) (AIR 1987 Calcutta 172)**

> "Having gone through the Judgment, I respectfully agree with the view taken by their Lordships and hold that notwithstanding the stay order passed by this court the learned Munsif

was competent to entertain and dispose of the application for ad interim injunction."

In **(Rameshwar V. Vth Addl. District Judge, Basti and others) (AIR 1999 Allahabad 1)**

" In such circumstances it is the duty and responsibility of the learned Court below to examine the scope and ambit of the stay granted having regard to the interlocutory matters which would have no impact on the said decision and shall not affect the decision on merits of the case."

In **(Amita Kaushish and Others V. Sanjay Kaushish and Others) (1996) 7 Supreme Court Cases 19)**

The stay of the trial of the suit does not preclude the respondents to seek such appropriate interlocutory reliefs as may be available and warranted in the facts and circumstances"

In **(Metro Marins and Another V. Bonus Watch Co. (P) Ltd. And Others) (2004) 7 Supreme Court Cases 478)**

"As observed by the learned Single Judge the issue whether the plaintiff is entitled to possession is yet to be decided in the trial Court and granting of any interim order directing handing over of possession would only mean decreeing the suit even before trial. Once the possession of the appellant either directly or through his agent (caretaker) is admitted then the fact that the appellant is not using the said property for commercial purpose or not using the same for any beneficial purpose or the appellant has to pay huge amount by way of damages int he event of he losing the case or the fact that the litigation between the parties is a luxury .litigation are all facts which are irrelevant for changing the status quo in regard to possession during the pendency of the suit."

> "In view of our above findings, we think it appropriate than even the appointment of a Receiver, be at it an interim order or otherwise, to supervise the possession of the property in question is also unnecessary, hence the said appointment of Receiver is also set aside."

10. After considering the decisions, as observed above, and in absence of any specific change of circumstances and or additional affidavit or material on the record, the plaintiff failed to make out a case for grant of any relief in terms of prayer clause (a) and (b). Admittedly, in the present case, the application for revocation of special leave petition and/or claim of enhancement of compensation to the extent of Rs. 75,000/- was not granted. Therefore, general invocation of provisions of order 22 rule 3 or 4 or order 39 rule 1 and 2 and or order 40 rule 1 or order 38 rule 6 of C.P.C. as sought to be prayed in this notice of motion, is difficult to grant. The pending civil appeal in the Supreme Court itself an additional factor which goes in favour of the defendants and not in favour of the plaintiff to grant interim relief, as prayed in the Notice of Motion. The apprehension about the property, as referred above has already been reflected in the affidavit in support of notice of motion. Taking into

account above fact and circumstances, the suit premises has been in occupation and possession of the defendants, since long, no case is made for any other protection and/or damage, or any sort of threat or danger. There is no case even of a " just and convenient" made out for passing an extreme order of appointment of receiver.

11. The essential of appointment of receiver in such circumstances as observed by the Apex Court in (2004) 7 Supreme Court cases 478 (Metro Marins and Another V. Bonus Watch Co. (P) and Others) has not been made out. In the present case, ad interim relief granted in terms of prayer (c) and (d) has been in existence since the date of interim order and it remained intact till this date is correct and appropriate order.

12 . In so far as, grant of mesne profit to the extent of Rs. 75,000/- per month as set out in the notice of motion, has rightly contended by the Counsel appearing for the defendants, cannot be decided unless the status and relationship of landlord and tenant in reference to premises in question decide by the Apex court. This vital issue is res-subjudice.

13. The Apex Court in **(Ramnik Vallabhdas Madhvani and others V. Taraben Pravinlal Madhvani), (2004) 1 SCC 497**, in reference to mesne profit observed as under;

"Mesne profit has been defined in Section 2 (12) of the Code of Civil Procedure to mean as profits which the person in wrongful possession of property actually received or might with ordinary diligence would have received therefrom, together with interest on such profits."

The Apex Court in another judgment **(Anderson Ors. Wright & Co. V. Amar Nath Roy and Ors) J.T. 2005 (11) SC 3**, referring to earlier Supreme Court's judgment **(Atma Ram Properties (P) Ltd. V. Federal Motors (P) Ltd.) 2005 (3) Bom.C.R. (SC) 274** observed as under;

"As held by this Court in Atma Ram Property (P) Ltd. V. Federal Motors (P) Ltd., once a decree for eviction has been passed, in the event of execution such reasonable terms, as would in the opinion of the Appellate Court reasonably compensate the decree holder for loss occasioned by delay in execution of the decree by the grant of stay in the event of the appeal being dismissed."

14. In the present case admittedly, there is no quantification and/or final decree of a mesne profit and interest thereon, in favour of the plaintiffs for the alleged illegal and wrongful use and occupation and possession of the property in question. The principle and right of mesne profit, as culled out from the Apex

Court's decision pre supposes wrongful occupation and possession. A right to rent requires a tenancy agreement and/or rightful use and rightful possession of the property. In the present case, issue about the nature of the occupation and possession is still pending in the Supreme Court of India.

15. Notably, the Apex Court, in Ramnik Vallabhdas (Supra) in para 20 at page 510, observed while dealing with the final hearing of the civil appeal, as under;

"It follows that disposal of SLP against a judgment of the High Court does not mean that the said Judgment is affirmed by such dismissal. The order on a special leave petition is also never res judicata. In the present case we are at a stage where we are hearing appeals i.e. leave to appeal has already been granted and these are full-fledged appeals against the judgment of the High Court before us. Therefore, we are entitled to go into the question of legality and correctness of the impugned judgment."

16. Therefore, the status of the defendants in reference to the premises in question and all related rights of use and occupation of the premises in question have not yet attained the finality. The defendants are admittedly in possession and occupation of the premises in question till this date. The order of the appellate Court of Small Cause Court dated 9/10/2001 in Appeal NO.

420/99 has not attained the finality. Even though the writ petition filed by the defendant was rejected. The declaration by the small causes Court in suit NO. 1744/1986, by the order dated 16th March, 1999 passed in favour of the defendant, declared him to be the tenant in respect of suit premises cannot be overlooked at this stage.

17. The grant of special leave petition and or pending civil appeal in the Apex Court against the said orders, disentitled the plaintiff to claim such huge amount towards the mesne profit at this stage.

18. It is difficult now for the plaintiff to insist for the same relief in the present notice of motion, as prayed in clause (b) of notice of motion. The defendants are admittedly, depositing the amount at the rate of Rs. 3000/- per month, as directed by the appellate Court of Small Causes Courts Therefore, the need to enhanced such amount by the defendants cannot be considered in this notice of motion at this stage. The plaintiff is free to file appropriate application before the appropriate forum. Therefore in view of above background, no relief as such can be granted in terms of

prayer clause (b) also.

19. However, considering the rival contentions between the parties and as there is no objection, the order dated 13th October, 2003 and the interim relief granted in terms of prayer clause (d) and (e) need to be confirmed. There is no submission made by the defendants to vacate the same, there is no supporting material to demonstrate the reason to vacate or modify the order dated 13th October, 2003, which has been in operation against the defendants since 13th October, 2003. Taking this into account and all the facts and circumstances of the case, I am confirming the ad interim order, dated 13th October, 2003. However, in view of the above observations, I am declined to grant any other relief, as prayed in the notice of motion and clause (a) and (b) as prayed, the notice of motion therefore, accordingly disposed of.

[ANOOP V. MOHTA, J.]